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IN THE

SUPREME COURT

OF THE

United States

October Term, 1954

WILLARD L. GLEESON and MARY F. GLEESON,
Petitioners,

vs.

FRED E. CARR, Trustee in Bankruptcy of the Estate of Broadcasting Corporation of America, Debtor,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice Earl Warren and to the Honorable Associate Justices of the Supreme Court of the United States:

Your Petitioners, WILLARD L. GLEESON and MARY F. GLEESON, respectfully petition this Honorable Court for a Writ of Certiorari, directed to the United States Court of Appeals for the Ninth Circuit, to re-examine and reverse a judgment of the United States Court of Appeals for the Ninth Circuit in a

bankruptcy matter involving fundamental questions of importance in the law of bankruptcy, which should be decided by this Honorable Court.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1251, U. S. Code, and by Title 11, Section 24, of the Bankruptcy Act, and Section 57(a) of the Bankruptcy Act.

The decision of the United States Court of Appeals for the Ninth Circuit was rendered on January 15, 1955. The petition for rehearing was denied on March 22nd, 1955. This petition is filed within 90 days of the denial of the Petition for Rehearing in the said cause.

STATUTES INVOLVED

TITLE 10:

> "Sec. 120. Whenever notice is to be given under this chapter, the court shall designate, if not otherwise specified hereunder, the time within which, the persons to whom, and the form and manner in which the notice shall be given. Any notice to be given under this chapter may be combined, whenever feasible, with any other notice or notices to be given under this chapter."

Section 128 of the Bankruptcy Act, as follows:

> "Sec. 128. If no bankruptcy proceeding is pending, an original petition may be filed with the

court in whose territorial jurisdiction the corporation has had its principal place of business or its principal assets for the preceding six months or for a longer portion of the preceding six month than in any other jurisdiction."

Section 236:

"If no plan is proposed within the time fixed or extended by the judge, or if no plan proposed is approved by the judge and no further time is granted for the proposal of a plan, or if no plan approved by the judge is accepted within the time fixed or extended by the judge, or if confirmation of the plan is refused, or if a confirmed plan is not consummated, the judge shall . . .

. . . . . .

(2) Where the petition was filed under Section 128 of this Act, after hearing upon notice to the debtor, stockholders, creditors, indenture trustees, and such other persons as the judge may designate, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act, or dismissing the proceeding under this chapter, as in the opinion of the judge may be in the interests of the creditors and stockholders."

Section 238:

"Upon the entry of an order directing that bankruptcy be proceeded with . . .

(1) . . . where the petition was filed under Section 128 of this Act, the proceeding shall there-

after be conducted so far as possible, in the same manner and with like effect as if an involuntary petition for adjudication had been filed at the time when the petition under this chapter was filed, and a decree of adjudication had been entered at the time when the petition under this chapter was approved; . . ."

Section 147:

"A petition filed under this chapter improperly because adequate relief can be obtained by the debtor under Chapter XI of this Act may, upon the application of the debtor, be amended to comply with the requirements of Chapter XI for the filing of a debtor's petition, and shall thereafter for the purposes of Chapter XI be deemed to have been originally filed thereunder."

Section 22:

"Reference to Petitions. a. The judge may at any stage of a proceeding under this Act refer the same to a referee, either generally or specially.

b. The judge may, at any time, *for the convenience of parties or for cause,* transfer a case from one referee to another.

OPINIONS BELOW

The Opinion Below is made a part of this record. It is also printed in 219 Fed. (2) 64.

SHORT STATEMENT OF THE CASE

Willard L. Gleeson and Mary F. Gleeson are the principal stockholders of Broadcasting Corporation of America; W. L. Gleeson is its President. The corporation is the owner and operator of five radio stations in the farm belt of Southern California.

The Corporation was granted No. 1 Television Channel by the Federal Communications Commission, in December 1946, and later, after the corporation had spent money building its television station, the channel was deleted by the government to turn the channel over to mobile units and prevent international interference.[1] As a result the corporation ran into financial difficulties and, on November 29, 1951, after originally filing a petition under Chapter XI of the Bankruptcy Act, filed its Amended Petition under Chapter X, Section 501-676 of the Bankruptcy Act for corporate reorganization on a basis commensurate with a true and intrinsic value of the property belonging to the debtor (R. 12). The petition listed its assets of its various radio stations totaling $595,566.89 (R. 5); and its liabilities as $195,392.00. (R. 4).

---

[1]Congress by its own resolution referred the matter to the Court of Claims of Claims. (House Resolution 284; 83rd Congress, First Session.)

It appears that during the shortages of funds which the corporation ran into that its President borrowed money, personally, and turned the money into the corporation to enable it to continue its operations. (R. 182.)

The Petition for Reorganization set out that its total liability is $195,392.60 and its assets $595,566.89 (R. 5) that its assets exceeded its liabilities in the amount of $400,174.29; that the largest single creditor of the petition is W. L. Gleeson, the President; that he desires a reorganization, and that the creditors have expressed their willingness to cooperate.

Following the filing of the petition, the court entered an order approving the petition under Chapter X and appointed a Trustee (R. 39), the Trustee being William B. Ross, (R. 40). The matters were all then referred to Nelson C. Peters, a Referee in Bankruptcy, located at San Bernardino, California. He is the referee for the counties of Riverside and San Bernardino, where the stations and operations and witnesses of the corporation are located. Referee Peters had been appointed November 22, 1950 by all of the judges of the United States District Court for the Southern District of California for a period of six years, to sit in those counties.

By an order of Honorable Leon R. Yankwich, Presiding Judge of the United States District Court, Referee Peters was appointed and qualified as Referee for San Bernardino and Riverside Counties in

"the cases arising in San Bernardino and Riverside Counties hereafter."

Referee Peters, pursuant to the said order, heard the various matters; saw the witnesses and made decisions as Special Master in this case.

William B. Ross, the Trustee, then proceeded to get out a Notice in fine print to the creditors calling for a meeting and hearing on a Proposed Plan of Reorganization. This notice is set forth in the back of this Petition. It was the only notice ever sent out or given to anyone in this case. One of the vital questions was whether this notice was adequate to inform the creditors and other persons interested as to whether there would be a hearing and adjudication of bankruptcy.

On September 5th, 1952, Trustee Ross submitted a Proposed Plan of Reorganization, including the continuation of the present Trusteeship for a time and a re-setting of the present date for the hearing of the plan. (R. 123). Willard Gleeson, the President of the Corporation, objected to the trustee's proposed plan as not a plan for rehabilitation but rather of liquidation. (R. 137). He pointed out that the trustee's report showed that the stations had been operated and were operating at a profit and that there was no indication that liquidation was called for. The Special Master Peters, in his report, stated that at the time the petitions were filed the properties were appraised at "$501,500 and an appraiser appointed by the court fixed it at $12,000 higher." The Special Master, also, took testimony and saw witnesses regarding the claims

of Willard L. Gleeson and Mrs. Mary Gleeson for $90,760.00 and the assignment of trust deeds to the Citizens National Trust and Savings Bank, which accepted the assignment November 5, 1950, at the time when the corporation was not insolvent nor was there any fraud connected with the execution. (Findings of Referee Peters, R. 185). And, a showing that the money had been advanced to the corporation by Mr. Gleeson to pay salaries. Referee Peters also found that the trust deed was for the best interest and the benefit of the corporation, and that the minority stockholders ratified the transaction. The Referee concluded that the trust deed was a valid obligation and that nothing had been done about it for nearly three years prior to bankruptcy and he reported favorably to the court in connection with this matter and approved the allowance of the Gleeson claim and the recognition by the bankruptcy court of the trust deed to the Citizens National Trust and Savings Bank as a valid obligation (R. 187-188).[2]

The Special Master also found that the corporation had the approximate sum of $10,000 in profit at the time of making his report, in 1953; that the trustee anticipates a further profit for the month of June 1953 in the approximate sum of $4,000.00 (R. 254). His report also showed that the total sales of the Trustee in Possession as of May 22, 1953, beginning with his administration of January 14, 1952, was $291,967.97

[2]The Special Master found that "the Gleesons were the dominant and majority stockholders but their power was not used for self aggrandizement but to assist the corporation in getting out of its financial difficulty and on as fair terms as could be obtained by the corporation from any loan company." (R. 182)

(R. 250), and the total expenses of the trustee in possession was $254,964.21; that there was a cash balance on hand as of May 31, 1953 of $7,803.63, and accounts receivable as of May 31, 1953, in the sum of $38,882.60 (R. 250).

On April 1st, 1953, the debtor filed a Petition under Section 147 of the Bankruptcy Act to convert the Chapter X reorganization proceedings to Chapter XI, (R. 193), and in connection therewith he set up a proposed Plan of Arrangement. (R. 206).

Without any further notice or the taking of any testimony, the matter came on for hearing on the report of the Special Master, May 22nd, 1953. The District Judge, without taking any of the Gleeson's and the Citizens National Trust and Savings Bank's testimony or seeing or hearing any witnesses, disallowed the claims and adjudicated the corporation bankrupt. It then referred the matters to the Los Angeles Referee, "who will have charge of the now pending bankruptcy proceedings." (R. 230). Without taking any testimony, he disallowed the matters in the Special Master's report as inaccurate and incorrect. He took no testimony and heard no witnesses as to the fair market value of the assets of the corporation, but took the Special Master's statement thereof, (although he in another part of his finding said the report contained matters that were inaccurate and incorrect,) and thereupon (R. 225, 226) denied the petition to convert the Chapter X reorganization proceedings into a Chapter XI proceedings (R. 233) and entered an order adjudicat-

ing the corporation bankrupt, (R. 234a, 234b), and ordered the above proceedings referred to David Head, one of the Referees in Bankruptcy of the Court (located at Los Angeles) and invested David Head with jurisdiction in the matter.

QUESTIONS PRESENTED BY THIS PETITION

I.

WHETHER A SINGLE NOTICE BY A TRUSTEE IN BANKRUPTCY CALLING FOR A MEETING OF CREDITORS TO CONSIDER A PLAN UNDER CHAPTER X OF THE BANKRUPTCY ACT IS ADEQUATE NOTICE THAT AN ADJUDICATION OF THE CORPORATION AS A BANKRUPT WILL BE HAD AT A LATER TIME, AND IS ADEQUATE NOTICE TO ALL INTERESTED PARTIES OF THE PROPOSED BANKRUPTCY.

II.

WHETHER BEFORE A CORPORATION SEEKING REORGANIZATION UNDER CHAPTER X CAN BE ADJUDICATED A BANKRUPT WITHOUT A SPECIFIC NOTICE AND A SPECIFIC HEARING ON WHETHER IT SHOULD BE ADJUDICATED BANKRUPT, AND WHETHER THE JUDGE MAY SUMMARILY RENDER AN ADJUDICATION IN BANKRUPTCY WITHOUT SUCH NOTICE AND WITHOUT SUCH HEARING.

III.

WHETHER A REPORT OF THE SPECIAL MASTER WHO HEARD THE WITNESSES AND SAW THEM TESTIFY IS BINDING ON THE DISTRICT COURT UNLESS HIS FINDINGS ARE CLEARLY ERRONEOUS AND UNLESS THE DISTRICT JUDGE TAKES ADDITIONAL TESTIMONY TO DETERMINE THAT THEY ARE CLEARLY ERRONEOUS.

IV.

WHETHER A DISTRICT COURT ERRS IN SUMMARILY TRANSFERRING THE HEARINGS FROM A REFEREE ASSIGNED TO A PARTICULAR LOCAL WHERE THE CORPORATION IS LOCATED AND WHERE IT IS FOR THE CONVENIENCE OF THE WITNESSES TO ANOTHER LOCATION WITHOUT A SHOWING OF NECESSITY AND WITHOUT A SHOWING OF ADEQUATE CAUSE AS REQUIRED BY SECTION 22b OF THE BANKRUPTCY ACT.

V.

WHETHER AN OFFICER OF THE CORPORATION WHO BORROWS MONEY ON HIS PERSONAL HOLDINGS AND TOGETHER WITH THE BANK ACTED IN GOOD FAITH IN ADVANCING THE NECESSARY MONEY FOR A CORPORATION IN FINANCIAL DISTRESS SHOULD BE SUBORDINATED IN HIS CLAIM TO OTHER CREDITORS,

AND WHETHER SUCH PROCEEDINGS DO NOT COME UNDER THE CASE OF MANUFACTURERS TRUST CO. v. BECKER, 338 U. S. 304, 317, 94 L. ed. 107, RATHER THAN UNDER THE CASE OF PEPPER v. LITTON, 308 U. S. 295.

REASONS FOR GRANTING THE WRIT

(1) This case involves important questions of bankruptcy law which have not been, but should, be decided by this Honorable Court and also decide this case not in conformity with previous decisions of this Honorable Court.

One of the important questions involved in this bankruptcy law which have not been, but should be, case is the question of "Notice", and what constitutes adequate notice under the Bankruptcy Act.

The first amended petition in this case was filed under Chapter X of the Bankruptcy Act. Thereafter the Trustee, Ross, sent out a notice which is set forth in the back of this Petition. That notice, on its heading, was a notice to creditors regarding a proposed plan of reorganization. It read:

> "Notice to Creditors and Stockholders of a Meeting of the Creditors and Stockholders of above named Debtor and to all other Parties of Interest Known at Present and Statement of the Trustee re Plan".

If there is anything in this notice to indicate clearly that the corporation would be adjudicated a bankrupt,

we have failed to find it. No layman or creditor reading this notice could come to any such fair conclusion.

Nor, does the statute authorize such a notice at that stage of the proceeding. The proceeding was one in reorganization, under Chapter X.

> "A court of reorganization guards with equal solicitude the equity of stockholders and the priority of creditor."
>
> *Re Equitable Office Building Corp., debtor,* 96 L. Ed. 1390. (Justice Reed.)

Chapter X proceedings involve many different questions. The purpose is reorganization not bankruptcy, and the creditors and other interested parties have a right to know that reorganization of the corporation and its continued existence under its management will continue. That is an entirely different purpose than bankruptcy.

The notice therefore of a meeting of creditors and others for the purposes of reorganization is not a notice that the corporation intends to be adjudicated a bankrupt, or that there would be a hearing thereon.

One of the principal objects of the Chandler Act of 1938 in establishing Chapter X was to encourage the freer use of bankruptcy reorganization in order to avoid the unnecessary or premature liquidation.

> *Claridge Apartment Co. v. Comm. of Internal Revenue,* 323 U. S. 141, 89 L. Ed. 139.

Congress did not intend to resort to corporate reorganization proceedings under Chapter X of the Bankruptcy Act to be had for the mere purpose of liquidation.

Fidelity Assurance Assn. v. Simms, 318 U. S. 608, 87 L. Ed. 1032.

We submit that therefore before there could be an adjudication in bankruptcy there had be a SECOND hearing ON NOTICE, as required by Section 128 of the Bankruptcy Act, to the debtors, stockholders, creditors, indenture trustees and such other persons as the judge may designate to determine whether there should be a dismissal or an adjudication of bankruptcy, and the debtor was thereafter entitled to a full hearing and a showing, with evidence, after notice as required by the Bankruptcy Act. Without such a notice, all the subsequent proceedings were and are void and a nullity.

The United States Court of Appeals thought that the Notice given by the Trustee calling for a meeting of all creditors and stockholders to consider a plan of arrangement, entitled:

> "Notice to Creditors and Stockholders of a Meeting of the Creditors and Stockholders of above named Debtor and to all other Parties of Interest Known at Present and Statement of the Trustee re Plan",

as shown by the copy in the back of the petition, was sufficient notice to all the creditors and stockholders that there would be a hearing and adjudication in bank-

ruptcy. We submit that this presents a vital question of bankruptcy law which has not been, but should be, decided by this Honorable Court as to whether such Notice is in fact adequate and whether the notice in small type and legal language contains any notice that any creditor or stockholder would know there was to be an adjudication in bankruptcy.

We also contend that it was not the Congressional intent to have a combination of notices where it was intended that two hearings should be held, as set out in Section 236 (2). Furthermore, this Notice was prepared by the Trustee and not by the Referee.

The only notice given to anyone was a notice by the "Trustee in possession" re plan. (R. 295.) This notice read which is a notice to creditors and stockholders of a meeting of the creditors and stockholders of the above named debtors and to all other parties of interest known at present and statement trustee re plan. Nowhere in this notice is there any reference made to a proposed adjudication of the Broadcast Corporation of America as a bankrupt or that the notice was approved by the court (meaning a judge) or that any judge designated the time within which the persons to whom and the form and manner in which notice shall be given.

We respectfully submit that jurisdiction does not take place in the bankruptcy court until *Notice* is given as designated by the court (that is by a judge) and that the court fix the time within which the persons to whom and the form and manner in which the notice

shall be given. This authority is not delegated nor authorized to be given by the *trustee* nor by the *special master*. It is a notice which is required to be given by the COURT, arranged by the COURT, designated by the COURT, fixing the time and place and the form and manner in which the notice shall be given.

Nor is there any evidence anywhere that this Trustee's Notice, not authorized by the court, was sent to all of the creditors, stockholders, to the debtor, indenture trustee and other persons who might be interested. But, even after this so-called notice was sent out, Section 236 of the Bankruptcy Act requires another notice to be sent out if the court intends to adjudicate the corporation bankrupt, and intends for a hearing to take place after notice to the debtor, stockholders, creditors, indenture trustees and such other persons as the judge may designate.

Section 236(2) of the Bankruptcy Act reads as follows:

> That after plan fails of confirmation or is not consummated the judge shall 'where the petition was filed under Section 128 of this Act, after hearing upon notice to the debtor, stockholders, creditors, indenture trustees, and such other persons as the judge may designate, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act, or dismissing the proceeding under this chapter, as in the opinion of the judge may be in the interest of the creditors and stockholders."

This section specifically contemplates a specific notice that the court intends to adjudicate the corporation bankrupt, and that notice must be served upon the designated parties, then there must be a hearing thereon.

An examination of the proceedings in this case shows: (1) That there was no such notice sent to anyone—not to the debtors, the stockholders, to the creditors, indenture trustee, or any other persons interested; (2) That no hearing upon notice was held on the issue of bankruptcy. The court ruled the debtor bankrupt notwithstanding the inadequate state of its record, which does not support the Judges' recitals, order or findings.

We submit that until there was notice as designated by the statute and a hearing as designated by the statute, and that the court was withot jurisdiction to proceed.

In *New York v. New York, N. H. & H. R. Co.*, 344 U. S. 293, 97 L. Ed. 333 (decided January 12, 1953), the court points out that the requirements of notice are "the statute's mandate." It points out that:

> "Section 77 (c) (8) of the Act states that 'The judge shall cause reasonable notice of the period in which claims may be filed, . . . by publication or otherwise.' . . . It provides that 'The judge shall require . . . ' proper persons to file in the court a list of all known creditors, the amount and character of their claims and their last known postoffice addresses. This was not done here. Had

> the judge complied with the statute's mandate, it is likely that notice would have been mailed to New York City. . . . Nor can the bar order against New York be sustained because of the city's knowledge that reorganization of the railroad was taking place in the court. . . . But even creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred."

Likewise, the petitioners here and all other persons had a right to assume that before the court would declare the corporation bankrupt it would give reasonable notice of a hearing on the subject of either bankruptcy or dismissing the proceedings and hold a hearing thereon after notice as required by Section 236 of the Bankruptcy Act. This was not done. As stated in *New York v. New York, N. H. & H. R. Co.* case: "The statutory command for notice embodies a basic principle of justice—that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights. New York City has not been accorded that kind of notice." Likewise, Broadcast Corporation of America has not been accorded the kind of notice as set forth in Section 236 (2) of Bankruptcy Act; that it would be afforded a hearing upon notice either adjudging the debtor a bankrupt or dismissing the proceeding. Such a hearing would encompass the taking of *testimony* as to what may be in the *best interests* of the *creditors* and *stockholders* of whom the petitioners were most substantial and whose

best interests would have been served by dismissing and not adjudicating the petitioners bankrupt. We submit that it was error requiring reversal of the adjudication below.

Without debtors, stockholders, or directors having even been examined or an opportunity to be heard they were denied due process required under the Fifth Amendment U. S. Constitution.

Elliott v. Hovey, 167 U. S. 407; 42 L. Ed. 215;
Galpin v. Page, 85 U. S. (18 Wall.) 350;
Dartmouth College case, 17 U. S. 4; Wheaton 518;
Powell v. Alabama, 287 U. S. 45.

The writ should be granted to determine whether the trial judge may set aside the findings of the Special Master where not shown to be clearly erroneous and where he found that the transaction was handled for the benefit of all the corporation.

A

THERE WAS NO HEARING UPON NOTICE, AS REQUIRED BY SECTION 128 OF THE BANKRUPTCY ACT, TO THE DEBTORS, STOCKHOLDERS, CREDITORS, INDENTURE TRUSTEES, AND SUCH OTHER PERSONS AS THE JUDGE MAY DESIGNATE TO DETERMINE WHETHER THERE SHOULD BE A DISMISSAL OR AN ADJUDICATION OF BANKRUPTCY. THE DEBTOR WAS ENTITLED TO A FULL HEARING AND A SHOWING WITH EVIDENCE AFTER NOTICE, AS REQUIRED BY THE BANKRUPTCY ACT. WITHOUT SUCH NOTICE ALL SUBSEQUENT PROCEEDINGS WERE AND ARE VOID AND A NULLITY.

Section 236 of the Bankruptcy Act provides that if no plan is proposed within the time fixed or extended by the Judge, or if no plan proposed is approved by the Judge, and no further time is granted for the proposal of a plan, or if no plan approved by the judge is accepted within the time fixed or extended by the judge, or if confirmation of the plan is refused, or if a confirmed plan is not consummated, the judge shall "(2) Where the petition was filed under Sec. 128 of this Act, *after hearing upon notice to the debtors, stockholders, creditors, indenture trustees and such other persons as the judge may designate,* enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act, or dismissing the proceedings

under this Chapter, as in the opinion of the judge may be in the interest of the creditors and stockholders."

The record in this case shows that no such notice was given to the debtors, stockholders, creditors, indenture trustees and such other persons as the Judge may designate, but that on May 22, 1953, the judge summarily and without notice rejected the Special Master report and, without taking any testimony or hearing any evidence, or having any facts before him after notice to the parties, entered an order adjudging the debtor a bankrupt. The adjudication was and is void.

> *Sylvan Beach v. Koch,* 140 Fed. 2d 852, 861;
> *In Re American Bantam Car Co.,* 193 F. 2d 616, 621.

In *Sylvan Beach v. Koch,* 140 Fed. 2d 852 at 861, the court said:

> "In the absence of (1) notice to a party of the claim made against him, and (2) of a hearing or an opportunity to be heard in opposition thereto, a judgment entered upon the claim is a nullity. *Galpin v. Page,* 85 U. S. 350, 18 Wall. 350, 368, 369, 21 L. Ed. 959; *Windsor v. McVeigh,* 93 U. S. 274, 277, 278, 23 L. Ed. 914; *Coe v. Armour Fertilizer Works,* 237 U. S. 413, 423, 35 S. Ct. 625, 59 L. Ed. 1027; *Twining v. State of New Jersey,* 211 U. S. 78, 110, 111, 29 S. Ct. 14, 53 L. Ed. 97; *Ochoa v. Hernandez,* 230 U. S. 139, 161, 33 S. Ct. 1033, 57 L. Ed. 1427; *Postal Telegraph Cable Co. v. City of Newport,* 247 U. S. 464, 476, 38 S. Ct. 566, 62 L. Ed. 1215; *Truax v. Corrigan,* 257 U. S. 312, 332, 42

S. Ct. 124, 66 L. Ed. 254, 27 A.L.R. 375; *Gentry v. United States,* 8 Cir. 101 F. 51; *In re Rosser,* 8 Cir., 101 F. 562, 567, 570; *In re Noell,* 8 Cir., 93 F. 2d 5, 6, 7."

And, at page 862 the court said:

"We are also of the opinion that the court must, in terminating this reorganization proceeding, conform to §236(2) of the Bankruptcy Act, 11 U. S. C. A. §636(2), which provides that if no plan is approved or accepted, the judge shall, 'after hearing upon notice to the debtor, stockholders, creditors, indenture trustees, and such other persons as the judge may designate, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act, or dismissing the proceeding under this chapter, as in the opinion of the judge may be in the interests of the creditors and stockholders.' The Supreme Court of the United States has said that this statute 'does not contemplate a liquidation in a Chapter X proceeding but a liquidation in ordinary bankruptcy or a dismissal outright.' *Fidelity Assurance Ass'n v. Simms,* 318 U. S. 608, 621, 63 S. Ct. 807, 813."

In *In Re American Bantam Car Co.,* 193 F. 2d 616 at 621, the court said:

"If there is to be no reorganization and the Chapter X proceedings are to be terminated and the debtor returned to its stockholders notice must be given as required by Section 236(2) of the Bankruptcy Act, 11 U. S. C. A. §636(2). If the

Monroe proposal is to be accepted notice must be given as provided by Section 58, sub. a (6), 11 U. S. C. A. §94, sub. a (6). If the proceedings are to be dismissed, notice of the proposed dismissal must be afforded under the provisions of Section 58, sub. a (7), 11 U. S. C. A. §94, sub. a (7). Unless notice be given as required by the Bankruptcy Act, the court lacks the power to enter a valid order in the premises. Failure to comply with the requirement of G. O. 33 that the trustees must state their recommendation as to a proposed compromise to the court, has been held to constitute reversible error."

In re American Bantam Car Co., 193 Fed. 2d 616, 620.

§391. Purpose of Notice.—

"The requirement of notice is aimed at the elimination of the evil in insolvency proceedings and proceedings under former Bankruptcy Acts by which, under the cloak of secrecy, the assets available for the payment of creditors might be frittered away by mismanagement or by fraudulent and collusive practices in the sale of assets and the distribution of proceeds of the estate. (See *Columbia Bank v. Birkett*, 174 N. Y. 112, 66 N. E. 652, 102 Am. St. Rep. 478, aff'd 195 U. S. 345, 49 L. Ed. 231, 25 S. Ct. 38). If a creditor is to be deprived of his rights due process requires that he have notice or actual knowledge that a bankruptcy proceeding in whole or in part is under way so he may be heard or have an opportunity to be

heard. Figuratively, the creditors are all potential enemies and must have notice, so that they may participate, if they choose, in the war."

6 Am. Jur. Section 391, page 781.

§392. Time and Manner of Notice.—

"Subject to certain exceptions, notice to creditors means at least ten days' notice by mail to their respective addresses as they appear in the list of creditors prepared by the bankrupt or as subsequently filed with the papers in the case by the creditors. An order to show cause why a certain act should not be done or a certain course pursued is an approved method of giving notice of contemplated proceedings in a case in bankruptcy."

6 Am. Jur. Section 391, page 782.

Section 58 of the Bankruptcy Act, Title 11, Chapter 6, Section 94, provides for notice of at least ten days to creditors, at their respective addresses, and other proceedings.

The hearing contemplated upon notice under Section 236 of the Bankruptcy Act is a hearing upon ten days notice.

Section 21 (k) Bankruptcy Act (Title XI, Chapter 4, Sec. 44). And the hearing must inquire into whether it is in the best interest of the creditors and stockholders to dismiss the proceedings, or to adjudicate the corporation a bankrupt.

If the evidence discloses that the corporation is not actually a bankrupt adjudication, of course, would be improper. A full hearing is necessary in order to determine these facts, which hearing must be upon notice.

The court could therefore make no finding that it was in the best interest of the creditors and stockholder that the proceedings be not dismissed or that there be an adjudication, for this required a hearing and evidence.

In *New York v. New York, N. H. & H. R. Co.*, 344 U. S. 293, 97 L. Ed. 333, the United States Supreme Court said:

> "The statutory command for a notice embodies a basic principle of justice— that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights. New York City has not been accorded that kind of notice. Reversed."

In that case there was notice by publication. In our case, none.

Notice to the parties as required by statute was essential and without it the proceedings were and are a nullity. The adjudication is therefore entirely void and all subsequent proceedings had thereafter were and are void.

B

THE DISTRICT COURT MISCONCEIVED THE PURPOSE OF CHAPTER X PROCEEDINGS, WHICH WAS TO AVOID THE CONSEQUENCES TO DEBTORS AND CREDITORS OF FORECLOSURES, LIQUIDATIONS AND FORCED SALES WITH A DRASTIC INFLATIONARY EFFECT.

One of the purposes of the provision of the Bankruptcy Act relating to corporate reorganization was to avoid the consequences to debtors and creditors of foreclosures, liquidations and forced sales with their drastic inflationary effect.

> *Case v. Los Angeles Lumber & Products Co.*, 308 U. S. 106.

The Court at this point was required to take testimony regarding the earning capacity of the enterprise, as essential to the determination of the feasibility, as well as determining all facts relevant to future earning capacity and income and enhance the present worth and nature and condition of all the properties, the past earning record and all circumstances which indicate whether or not that record is a reliable criterion of future performance, and the sum of values based upon physical factors and assigned to separate units of property without regard to earning capacity of the whole enterprise. Without doing so, the court acted upon inadequate and improper information and could not summarily thus adjudicate the corporation a bankrupt.

Consolidated Rock Products Corp. v. DuBois, 312 U. S. 510, 85 L. Ed. 982.

One of the principal objects of the Chandler Act of 1938, revising Provisions for Reorganization under the Bankruptcy Act, was to encourage the freer use of bankruptcy reorganization in order to avoid unnecessary or premature liquidation.

Claridge Apartment Co. v. Comm. of Internal Rev., 323 U. S. 141, 89 L. Ed. 139.

Congress did not intend to resort to corporate reorganization proceedings under Chapter X of the Bankruptcy Act to be had for the mere purpose of liquidation.

Fidelity Assurance Assn. v. Simms, 318 U. S. 608, 87 L. Ed. 1032.

C

THERE WAS NO EVIDENCE BEFORE THE COURT UPON WHICH THE COURT COULD PROCEED TO DETERMINE WHETHER THE PROCEEDINGS SHOULD BE DISMISSED, OR WHETHER AN ADJUDICATION SHOULD BE ENTERED IN BANKRUPTCY.

Although the court did not have before it at the time it acted the report of the trustee who a few days later made a report showing that the corporation was making a profit; that its bills were being paid and adequately met, the court rejected the report of the Special Master as incorrect and inadequate, and yet took that portion of the Special Master's report that it wanted to use for the purpose of adjudicating the corporation a bankrupt. This it could not do. Having rejected sections of the special master's report as inaccurate and inadequate, it should have been rejected *in toto,* and he could not thereafter use that part of it, which sustained the court without taking independent testimony and making his own determination from facts and evidence thus submitted.

The court was required to make its own finding based upon its own independent investigation, at this stage, to determine the feasibility and fairness of reorganization, the question of dismissal of the proceedings, and the question of adjudication, if required after such showing, but only after notice as set out in Point One (a), as required by the section.

There was no evidence of bankruptcy in a true sense. It was incumbent upon the District Court to determine whether at the time (May 22, 1953 and after the corporation had made considerable profits) it was bankrupt, which was not done. Unless the District Court had evidence that the company was a bankrupt in a true sense, it had no right to adjudicate it as a bankrupt.

D

THE DISTRICT COURT ERRED IN REFERRING THE PROCEEDINGS TO DAVID B. HEAD, ONE OF THE REFEREES IN BANKRUPTCY IN LOS ANGELES COUNTY INSTEAD OF N. C. PETERS, THE REFEREE IN BANKRUPTCY FOR THE COUNTY OF SAN BERNARDINO AND RIVERSIDE, THE DEBTOR HAVING ITS PRINCIPAL PLACE OF BUSINESS, ITS PRINCIPAL ASSETS AND THE GREATER PORTION OF ITS CREDITORS IN RIVERSIDE COUNTY FOR THE GREATER PORTION OF THE SIX MONTHS IMMEDIATELY PRECEDING THE FILING OF THE PETITION.

The case was duly and regularly within the jurisdiction of Nelson C. Peters, Referee in San Bernardino,

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[3]At the time of its application under Chapter X, the assets of the Broadcast Corporation of America were appraised by the General Appraisement Company, for $501,500.00 and by the official appraiser appointed by the court, after the petition, at $12,000.00 more, or $513,500.00. (R. 182)

Adjudication under Chapter X dates back to the date when the petition was first filed.

Sec. 238 Bankruptcy Act.

for the counties of San Bernardino and Riverside, duly and regularly appointed for that position for six years, on January 1st, 1951. It was the duty of the court to refer the case to the Referee for the convenience of the witnesses, who were located in that area, and where the principal place of business of the bankrupt was located. The court appointed Mr. Peters as Special Master, but without holding a hearing on the question of convenience of the witnesses and the creditors, arbitrarily assigned the case to David B. Head in Los Angeles, which is 53 miles from Riverside, 224 miles from Blythe, 127 miles from Indio, and 200 miles from Brawley, and all within the jurisdiction of Referee Peters.

Section 22 of the Bankruptcy Act provides that the judge may, for the convenience of the parties or for cause, transfer a case from one Referee to another. But, here, the convenience of the parties was all the other way, and no cause was shown why it should not remain in the district where it was located.

We submit that it was prejudicial error to transfer the case without holding a hearing on the necessity for it and without a showing as to either cause or convenience of the parties. The court treated the case as one for the convenience of the Referee and local counsel for the trustee, rather than for the convenience of the parties, and no cause being shown it was prejudicial error to have removed it from the district where it belonged.

E

THE DISTRICT COURT ERRED IN DENYING THE DEBTOR'S PETITION UNDER SECTION 147 TO CONVERT THE CHAPTER X PROCEEDING INTO A CHAPTER XI PROCEEDING. (R. 290).

The petitioners had a statutory right to convert the proceedings from Chapter X to Chapter XI. This was denied.

F

THE DISTRICT COURT JUDGE ERRED IN REFERRING THESE PROCEEDINGS TO REFEREE DAVID B. HEAD.

The locale of the bankrupt corporation was Riverside. Section 22(b) of the Bankruptcy Act provides:

> "The judge may, at any time, for the convenience of parties, or for cause, transfer a case from one referee to another."

We assume, likewise, that such transfer should be made upon notice and hearing to the parties to establish: (1) The convenience of the parties; or (2) For cause. Neither was done here. All of the parties and the corporation are all located in the Riverside area, a distance of many miles from Los Angeles. No creditor, trustee, or other party in interest had asked that the cause be transferred to Los Angeles. The transfer certainly created a great inconvenience to the parties.

The debtor corporation, its books, its records, even its trustee, are all located at Riverside.

(2) There was no cause shown to the court, nor was there any opportunity to be heard on the subject of whether there was any cause. The court summarily transferred the cause from Referee Peters to Referee Head. Such a transfer, under the circumstances, was not authorized. Had there been notice and a hearing to the parties on the subject, there would have been discretion. Without notice or hearing, the court acted arbitrarily and did not exercise any discretion, but acted on the whimsey of the District Judge. (See *Gossman v. Gossman,* 52 Cal. App. 2d 184, 194.)

In *Mattox v. United States,* 146 U. S. 140, 153; 36 L. Ed. 920, the Supreme Court of the United States discussed the matter of discretion and pointed out that where the court hears a matter and then determines it after hearing that there has been an exercise of discretion but that when it acts without such a hearing there has been no exercise of discretion.

G

THE DISTRICT COURT ERRED IN DENYING CLAIM OF MR. GLEESON, WHO IN GOOD FAITH BORROWED THE MONEY AND PUT IT INTO THE CORPORATION TO KEEP IT GOING.

This case is easily distinguishable from *Pepper v. Litton,* 308 U. S. 295, wherein the court determined there was a planned and fraudulent scheme to confess a judgment in the state courts. In this case the President of the corporation merely borrowed money on his home and all the property to turn it into the corporation so he could keep it going. It appears from the findings of fact that the report of the Special Master, who saw and heard the witnesses and took the testimony, recommended the allowance of the secured claims of the petitioners, W. L. Gleeson and his wife, and the allowance of the aforesaid claims and the claim of the Citizens National Trust and Savings Bank of Riverside.

The matter was submitted on the favorable report of the Special Master which the court rejected.

It was not disputed that the four per cent promissory note of Willard L Gleeson, in the sum of $90,-762.60, together with a second trust deed on certain real property belonging to the bankrupt corporation in Riverside County, California, was security for money previously advanced and unsecured demand note for $26,000.00 of which was made prior to De-

cember 31, 1944 and accumulated salaries of one year prior to the debtor corporation giving the $190,762.60 trust deed.

The Respondent does not dispute that these monies were advanced to keep the corporation going and to build it up and as a claim for labor services rendered by Gleeson himself as Manager and Engineer. He asserts that they would have been barred by the Statute of Limitations. But, moneys that are due and owing on demand notes renewed each year are not barred merely because they are not paid. Acknowledgment of an indebtedness in writing waives the bar of the statute of limitations and it cannot be doubted that the promissory note, signed and executed by the corporation, was a proper signing.

It is evident that it was necessary for the corporation to re-finance itself and get additional monies to keep going because of the depletion of its funds in having its television channel deleted without any fault of its own. Based upon this premissory note, the Citizens National Trust & Savings Bank of Riverside refinanced the obligation, which gave the corporation additional monies. Like all other proceedings in this case, the trial judge did not take additional testimony, or any testimony himself, and the findings are not based upon his own evidence but upon the master's evidence who reached a decision contrary to those of the trial judge.

A corporation which has assets of $501,500.00 and liabilities of $262,000.00 is surely entitled to secure its

indebtedness and refinance itself to the extent of $90,000, which the Citizens National Trust & Savings Bank of Riverside recognized. We submit that since it was not shown at the date of bankruptcy that the corporation was insolvent, that the right of the Gleesons to have acknowledged the indebtedness to them and to secure further loans from the bank on the basis of a second trust entirely signed to the bank—the money of which was all used for the benefit of the corporation and not themselves—was certainly not fraudulent and was designed to continue the services of the corporation if possible.

It must be borne in mind that the proceedings filed in this case were not bankruptcy. They were *re-organization* proceedings, under Chapter X. Under reorganization, capital was necessary and they sought that capital with their own obligations and sacrificed everything that they had put into the corporation from 1944 on.

This case follows the case of *Manufacturers Trust Co. v. Becker,* 338 U. S. 304, where this court said:

> "Claims of a corporate officer or director arising out of transactions with the corporation have been enforced when good faith and fairness were found. *Sanford Fork & Tool Co. v. Howe, Brown & Co.,* 157 U. S. 312, 39 L. ed. 713, 15 S. Ct. 621 (1895); cf. *Marine & River Phosphate Min. & Mfg. Co. v. Bradley,* 105 U. S. 175, 26 L. ed. 1034 (1882); see *Richardson's Exr. v. Green* (*Washburn v. Green*), 133 U. S. 30, 43, 33 L. ed. 516, 521,

10 S. Ct. 280 (1890); *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 589-591, 23 L. ed. 328, 330, 331 (1876)."

(338 U. S. 310).

The questions presented here involve important questions of Bankruptcy Law which have not been, but should be, determined by this Honorable Court, and involve the interpretation of two bankruptcy statutes and the time and adequacy of notices under the Bankruptcy Act.

For which reasons we pray that this Honorable Court grant certiorari and reverse the judgments below.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioners.

Appendix

Appendix

APPENDIX

OPINION

Willard L. Gleeson and Mary F. Gleeson, Appellants,
v.
Fred E. Carr, Trustee in Bankruptcy of the Estate of Broadcasting Corporation of America, debtor, Appellee.

No. 14203.

United States Court of Appeals, Ninth Circuit.
Jan. 15, 1955.

Corporate reorganization proceedings under the Bankruptcy Act. The United States District Court for the Southern District of California, Central Division, William M. Byrne, J., entered orders adverse to certain stockholders of corporation, and such stockholders appealed. The Court of Appeals, McLaughlin, District Judge, held, *inter alia,* that, where debtor's petition to amend to convert reorganization proceeding into arrangement matter was based upon possibility that debtor might realize compensation from Congress for losses incurred due to adverse governmental action, trial court's denial of request to amend, on ground that movant's optimism should be based on facts, not hope, did not constitute an abuse of discretion.

Orders affirmed.

Morris Lavine, Los Angeles, Cal., Shaw & Kegley Riverside, Cal., for appellants.

Craig, Weller & Laugharn, Frank C. Weller Hubert F. Laugharn, Thomas S. Tobin, Los Angeles Cal., for appellee.

Before Stephens and Chambers, Circuit Judges and McLaughlin, District Judge.

McLaughlin, District Judge.

This is an appeal taken from orders made in a reorganization proceeding under Chapter X of the Bankruptcy Act.

The Broadcasting Corporation of America, debtor, hereinafter referred to as BCA, is a California corporation which operated five radio stations in California for some time prior to 1946. The outstanding stock of BCA totals 250 shares owned as follows:

127 shares—Willard Gleeson
106 shares—E. W. Laisne
10 shares—E. D. Laisne (son og E. W. Laisne)
7 shares—held individually by seven persons

Appellants Willard and Mary Gleeson are husband and wife. In addition to being the sole majority stockholder, Mr. Gleeson is a director, president, and manager of BCA; Mrs. Gleeson is a director and secretary of BCA. E. W. Laisne is the third director.

In December, 1946, BCA was assigned television Channel 1 for the Federal Communications Commission and began construction. In May, 1947, work was suspended by virtue of an international dispute over Channel 1 and subsequently the Commission withdrew the Channel. In November, 1947, Channel 6 was tentatively assigned to BCA; however, the Commission suspended construction on all new television stations in the United States in March, 1948, and since then BCA has not resumed construction. The significance of attempting to incorporate television within its operations is the cost incurred which materially impaired the financial condition of BCA.

In September, 1949, a meeting of the board of directors of BCA was held. Only the Gleesons attended this meeting; Laisne had notice but did not attend. At the meeting, Mr. Gleeson made a motion to adopt a resolution authorizing and directing him as president and Mrs. Gleeson as secretary to execute and deliver a promissory note in the sum of $90,762.60 to themselves, secured by a second trust deed upon the real property of BCA. This motion was seconded by Mrs. Gleeson, adopted by both, and the resolution was executed two days thereafter. The note is based upon the following pre-existing indebtedness:

$25,966.45—Advances to BCA prior to December 31, 1944

30,600.00—Cash advances, January 1, 1945 to September 21, 1949

24,500.00—Accumulated salary from 1938 to October 1, 1949
9,696.15—Miscellaneous

At the time the note and trust deed were given, BCA was heavily indebted to many creditors, secured as well as unsecured. These corporate debts were incurred through Gleeson as president and manager of BCA. No offer of similar security was made to other unsecured creditors.

On November 29, 1951, BCA filed an amended petition under Chapter X of the Bankruptcy Act, 11 U.S.C.A. §501 et seq., seeking reorganization. The petition represented that the corporate assets were valued at $595,566.89 and its liability totaled $195,392.60. The petition was approved; William Ross appointed trustee in possession and Nelson Peters appointed special master to hear and report on all matters arising in the court of the reorganization proceeding. Dates for the various hearings were set, including the hearing pursuant to Chapter X, §236 of the Act, 11 U.S.C.A. §636, in the event no plan was approved. The trustee was directed to give notice of the hearings to all parties in interest. Printed notices were sent out on or about July 28, 1952, to two hundred and forty-three creditors and parties in interest. The appellants and the debtor corporation attended the hearings; appellants filed secured claims and the debtor corporation, objecting to the plan proposed by the trustee, proposed a plan of its own. Both plans were eventually

rejected by the creditors. BCA then filed a petition on April 1, 1953, under Chapter X, §147 of the Act, 11 U.S.C.A. §547, to convert to a Chapter XI proceeding based on a bill pending in Congress to appropriate approximately $300,000.00 to compensate BCA for the loss attributable to the governmental action incurred in its television venture. This petition was denied.

The special master found the total assets of BCA to be $211,167.89 while its liabilities amounted to $431,-138.76. The master recommended that the debtor be adjudged a bankrupt and that the secured claims of appellants and the Citizens National Trust & Savings Bank of Riverside be allowed.

The final hearing on the reorganization matter was held on March 2, 1953. In the order dated May 22, 1953, the district judge made the following determinations; the assets and liabilities of BCA on October 29, 1951 (the date of the original petition) were $211,-167.89 and $431,138.76 respectively; BCA was adjudged a bankrupt and the matter referred to David Head as referee in bankruptcy; the secured claims of appellants and the Riverside Bank to the extent that its claim was based on personal notes of appellants or guaranteed by them were disallowed.

The Gleesons, as individuals, in an amended notice, appeal from the above orders and specify the following errors;

1. The district court erred in entering the order adjudging the debtor a bankrupt as there was no hearing upon notice as required by §236 of the Act.

2. The district court erred in referring the proceedings to David B. Head of Los Angeles instead of N. C. Peters of Riverside.

3. The district court erred in denying the debtor's petition under §147 of the Bankruptcy Act to convert the proceedings to one under Chapter XI.

4. The district court erred in disallowing the secured claims of Willard and Mary Gleeson and that portion of the secured claim of the Riverside Bank representing a direct and individual debt of Willard Gleeson.

The trustee in bankruptcy filed a motion to dismiss this appeal in so far as it attacks the order adjudicating BCA a bankrupt.

Motion to Dismiss

The trustee in bankruptcy's motion must be denied. The motion's merit is to be measured by those portions of the Act specifically governing appeals in reorganization proceedings. These provisions control here as the adjudication of the corporation as a bankrupt was made as an order terminating the reorganization proceedings.[1]

As creditors, appellants' standing to appeal is derived from §206 of the Act, 11 U.S.C.A. §606, which provides that.

> "The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the

[1]Transcript of Record, pp. 211, 235.

right to be heard on all matters arising in a proceeding under this chapter."

The right to be heard under this section includes the right to appeal. *Rogers v. Consolidated Rock Products Co.,* 9 Cir., 1940, 114 F. 2d 108; *In re Keystone Realty Holding Co.,* 3 Cir., 1941, 117 F. 2d 1003; *Dana v. Securities & Exchange Commission,* 2 Cir., 1942, 125 F. 2d 542; *In re South State Street Bldg. Corp.,* 7 Cir., 1943, 140 F. 2d 363; *Horowitz v. Kaplan,* 1 Cir., 1951, 193 F. 2d 64.

Since the order adjudicating BCA a bankrupt was a matter arising in a proceeding under Chapter X, §236 of the Act, it falls within the purview of §206 granting appellants the right to be heard. By virtue of this right to be heard, appellants also have the right to appeal. For these reasons the motion must be denied.

Notice and Hearing under §236

We come now to the merits of this appeal.

Appellants claim that the order adjudging BCA a bankrupt was entered without a hearing upon notice as required by Chapter X, §236 of the Act. The plain meaning of §236 coincides with the fundamental essentials of due process that unless notice is given and a hearing held and an opportunity to be heard is accorded the parties affected, an adjudication of bankruptcy must be reversed. *Sylvan Beach v. Koch,* 8 Cir., 1944, 140 F. 2d 852; *In re American Bantam Car Co.,* 3 Cir., 1952, 193 F. 2d 616. However, this notice re-

quirement does not place a greater obligation upon the judge "than to see that notice reasonably designed to bring the matter in ordinary course to the creditor's attention is given." *North American Car Corp. v. Peerless W. & V. Mach. Corp.*, 2 Cir., 1944, 143 F. 2d 938, 941. Here the record clearly shows that the district court issued an order dated January 14, 1952 in which a hearing pursuant to §236 was set for May 12, 1952 at a specific time and place, and the trustee in possession was directed to give notice.[2] In his report dated September 5, 1952, the trustee in possession in the reorganization proceeding informed the court that pursuant to the amended orders of March 19 and July 10, 1952, the notice of hearing set for October 6, 1952 was sent out by mail to all known creditors, stockholders, and parties in interest, 243 in number, on or about July 28, 1952.[3] The hearing was continued from time to time to March 2, 1953 when BCA was adjudged a bankrupt.[4] Appellants attended the interim hearings and were or should have been well advised in the matter Under these circumstances we can only come to the conclusion that the order of adjudication was entered after a hearing held upon adequate notice. The fact that the notice was coupled with other notices regarding the reorganization proceeding presents no difficulties in view of §120 of the Act, 11 U.S.C.A. §520.

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[2]Transcript of Record, pp. 47, 48.
[3]Transcript of Record, pp. 123, 124, 295.
[4]Transcript of Record, pp. 244, 245.

Referee in Bankruptcy

Appellants complain that it was error for the district judge to refer the proceedings to David B. Head of Los Angeles as referee in bankruptcy instead of Referee N. C. Peters of Riverside. This is a matter in ordinary bankruptcy and not in reorganization, *Sylvan Beach v. Koch, supra,* and is therefore governed by §22, sub. b of the Act, 11 U.S.C.A. §45, sub. b. Under that section, the judge, within his discretion, may at any time for convenience of the parties or for cause transfer a case from one referee to another. *Benioff v. Wyman,* 9 Cir., 1952, 195 F. 2d 440; *G. Levor & Co. Inc. v. Hunt,* 6 Cir., 1940, 111 F. 2d 450. Here there is no evidence that the judge abused his discretion, nor is there any claim or evidence that the appellants were prejudiced by the reference.

Petition under §147

Appellants next complain of the order denying the petition of BCA under §147 of the Act to convert the Chapter X reorganization proceeding into a Chapter XI arrangement matter. Appellants claim that "The right to amend is given to the debtor under Section 147. The debtor in this case did amend, . . . when he does so, it shall be treated thereafter for all purposes as a Chapter XI proceedings."[5] Appellants misconstrue §147 to mean that a petition to amend by the debtor automatically converts the proceeding from reorganization to arrangement. On the contrary, the grant

[5]Opening Brief of Appellant, p. 26.

or denial of a request to amend rests within the court's discretion. *John Hancock Mut. Life Ins. Co. v. Casey,* 1 Cir., 1944, 141 F. 2d 104. The petition to amend is chiefly based on the possibility that the debtor may realize compensation from Congress for losses incurred in its television venture due to adverse governmental action.

The court below cannot be held to have abused its discretion in ruling that the movant's optimism should be based on facts, not hope. When, as and if the facts warrant, Chapter XI may be invoked.

Disallowance of Secured Claims

Finally appellants claim that the district court erred in disallowing the secured claims of appellants and the Riverside Bank contrary to the recommendations of the special master and without an independent hearing.

There can be no question of the power of the court to allow or disallow claims, secured and unsecured, in a reorganization proceeding. *Pepper v. Litton,* 1939, 308 U. S. 295, 60 S. Ct. 238, 84 L. Ed. 281; *In re Commonwealth Light & Power Co.,* 7 Cir., 1944, 141 F. 2d 734.

Nor can it be doubted that a master's report is other than advisory. It is not binding upon the court, and it may be adopted or rejected in whole or in part after due notice and opportunity to be heard has been accorded the interested parties. *In re Mifflin Chemical Corp.,* 3 Cir., 1941, 123 F. 2d 311; §117 of the Bankruptcy Act, 11 U.S.C.A. §517.

Here a hearing upon notice was held upon the subject of the master's report on January 26, 1953. The court found that it could not accept the master's finding and conclusion that appellants' claims were entitled to reorganization recognition as secured claims, and so set the same aside in this regard, finding and concluding for itself to the contrary.[6]

As appellants had notice and opportunity to be heard, they cannot now be heard to complain simply because the court disagreed with the master. No contention is made that the court was wrong in substance. Even if it were, no prejudicial error resulted here, for the reorganization plans failed, and during the bankruptcy proceedings under the very order of the court complained of appellants will have a chance to prove anew if they can their contention that they should be recognized as secured creditors of the bankrupt corporation.

The orders of May 22, 1953, appealed from are affirmed.

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[6]Transcript of Record, pp. 211, 244, 245.

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FILED
NOV 1 1955
HAROLD B. WILLEY, Clerk

No. 122

IN THE

SUPREME COURT

OF THE

United States

October Term, 1954

WILLARD L. GLEESON and
MARY F. GLEESON,
Petitioners,

vs.

FRED E. CARR, Trustee in Bankruptcy, of the Estate of Broadcasting Corporation of America, Debtor,
Respondent.

PETITION FOR REHEARING

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IN THE

SUPREME COURT

OF THE

United States

October Term, 1954

WILLARD L. GLEESON and MARY F. GLEESON, *Petitioners,* vs. FRED E. CARR, Trustee in Bankruptcy, of the Estate of Broadcasting Corporation of America, Debtor, *Respondent.*	No. 122

PETITION FOR REHEARING

To The Honorable Chief Justice Earl Warren and to the Honorable Associate Justices of the Supreme Court of the United States:

COME NOW Willard L. Gleeson and Mary F. Gleeson and petition for rehearing, and in respect thereto set forth as follows:

1. Sections 128 and 236 of the Bankruptcy Act have been unconstitutionally construed and applied in the court below, in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

The question, of controlling importance in the law of bankruptcy, has not been, but should be determined by this Honorable Court.

The Fifth Amendment to the Constitution of the United States provides under its due process clause that Notice and an Opportunity to be Heard are of the first essentials of due process of law.

Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158.

In bankruptcy the act provides for notice to be given by the Referee or under the direction of the Court and for a hearing on such notice. These are basic requirements of due process.

However, in this case, the only notice that the corporation, (which had petitioned for reorganization under Chapter X of the Bankruptcy Act), would be adjudicated a bankrupt, was in a broad, general Notice to Creditors of a Reorganization Meeting called by the *Trustee* to consider reorganization. No creditor, stockholder, or other person could determine from this notice that one year later and without any further notice, bankruptcy would be decreed.

We ask the Court to examine the so-called "Notice" from the Trustee, appended at the back of our original Petition for Certiorari, to determine whether such "notice" by a trustee of a meeting to consider reorganization, is such notice for a hearing a year later to determine whether bankruptcy should result as Congress contemplated, and whether an adjudication of

bankruptcy which followed a year later comports with due process guaranteed by the Fifth Amendment.

It is our position that the Bankruptcy Act requires two notices and *two* hearings, each on separate notice and separate hearing, before adjudication may follow. This did not take place in this case.

Constitutionally construed, we contend, Sections 128 and 236 of the Bankruptcy Act require:

(1) Notice of hearing on a plan of corporate reorganization. This is an effort to preserve the corporate entity.

(2) A second and separate notice and hearing on whether the reorganization has failed and adjudication should follow, and the assets of the corporation sold or liquidated. Any other procedure is sham and a denial of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

(1) This is so because in reorganization of a corporation the purpose is to save it by reorganization and to preserve it in its original form by reorganization. The objectives are entirely different, than

(2) Bankruptcy; where the objectives are to sell and distribute the assets for the benefit of creditors and *liquidation,* not *reorganization,* are its objectives.

Such a second procedure requires separate, specific notice and hearing on such specific notice that bankruptcy is contemplated. On such second notice and hearing this debtor would have an opportunity to show

that he was really not insolvent and should not be adjudicated.

Here, the petition for reorganization shows that the assets of the corporation were $595,566.89 and the liabilities were $195,392.00, and it was because of only being short of cash a proper case for reorganization. No separate hearing or notice was held before adjudication, giving an opportunity to the creditors and stockholders to show that the revised figures on which adjudication was based, were erroneous.

In respect to the hearing under Section 236, the United States Court of Appeals for the Ninth Circuit, in construing Section 236, held that:

> "§236 coincides with the fundamental essentials of due process that unless notice is given and a hearing held and an opportunity to be heard is accorded the parties affected, an adjudication of bankruptcy must be reversed. *Sylvan Beach v. Koch,* 8 Cir. 1944, 140 F. 2d 852; *In re American Bantam Car Co.,* 3 Cir., 1952, 193 F. 2d 616."

But, the Circuit Court did not apply the facts of this case to its own construction of the statute. We assert that Section 236 has been unconstitutionally applied. The only notice in this case was a notice by a trustee "Re Plan" (R. 295). This notice was "In Proceedings for the Reorganization of a corporation—No. 53024-WB" (R. 295).

A person of ordinary intelligence could look in vain for any "notice of a hearing for the purpose of bankruptcy."

Section 236 (2) of the Bankruptcy Act only provides that an adjudication can take place "after hearing upon notice to the debtor, stockholders, creditors, indenture trustees, and such other persons as the judge may designate . . . ."; but there was no judicial designation at any time after the trustee held a meeting "Re Plan" and no further or separate notice that any one could know that bankruptcy was contemplated.

The statement of the United States Court of Appeals that

> "The fact that the notice was coupled with other notices regarding the reorganization proceeding presents no difficulties in view of §120 of the Act, 11 U.S.C.A. §520."

ignores the express provisions of Section 236 that *there must be notice to such persons as the judge may designate* before an adjudication, and it also ignores the words "whenever feasible" in Section 120 to combine one notice with another notice.

We do not think that Congress intended that a notice of a prospective adjudication should be combined with a notice of reorganization, and it would be an unconstitutional application in this case since such a combined notice would involve two separate proceedings on two separate dates, about a year apart, and here the notice was as to only one proceeding on one date a year before.

We think the questions herein involved are of fundamental importance and present substantial consti-

tutional grounds available to petitioner under the Fifth Amendment to the Constitution of the United States, which we did not adequately present. Since filing our previous petition the Court of Claims has taken testimony fully in accordance with House Legislation H.R. Res No. 284 (a possible substanced asset) and that matter is now pending in that Court.

We pray for rehearing.

Respectfully submitted,

MORRIS LAVINE
Attorney for Petitioners.

CERTIFICATE OF COUNSEL

MORRIS LAVINE hereby certifies that the foregoing Petition for Rehearing is filed in good faith and not for the purposes of delay and is based upon substantial grounds available to peteitioner although not previously adequately presented, and is restricted to the grounds specified.

MORRIS LAVINE